

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

CARLA EPTING,

Plaintiff and Appellant,

v.

SIERRA JOINT COMMUNITY COLLEGE
DISTRICT,

Defendant and Respondent.

C084246

(Super. Ct. No. SCV0037750)

Carla Epting sued the Sierra Joint Community College District (the District), asserting claims for employment discrimination, among other things. The trial court sustained the District's demurrer with leave to amend, and when Epting failed to file an amended complaint, the trial court entered judgment of dismissal. Epting subsequently moved to vacate the judgment, set aside the dismissal, and permit filing of a first amended complaint, pursuant to Code of Civil Procedure section 473, subdivision (b),¹ but the trial court denied the motion.

¹ Undesignated statutory references are to the Code of Civil Procedure.

Epting now contends the trial court abused its discretion in denying her request for relief from the dismissal. We agree she is entitled to relief, as the record shows repeated errors and omissions by her counsel. We will reverse the judgment and remand the matter to the trial court with directions to grant Epting relief under section 473, subdivision (b), and to consider whether to issue further orders pursuant to the relief and penalty provisions of section 473, subdivision (c)(1). We express no opinion as to the sufficiency of any amended complaint.

BACKGROUND

Epting filed a complaint in Los Angeles County against the District and other entities, and the matter was transferred to Placer County. The trial court sustained the District's demurrer with leave to amend and ordered Epting to file a first amended complaint on or before September 16, 2016.

On September 21, 2016, after the deadline for amending the complaint had passed, Epting's attorney Michael Traylor notified the District's counsel that on September 23, 2016 at 8:00 a.m., he would file an ex parte application to extend the time for filing a first amended complaint. Traylor said he needed more time to prepare the first amended complaint because he recently had surgery and his client had been traveling.

On September 23 at 9:50 a.m., Traylor sent an e-mail to the District's counsel saying there was a problem with the legal service he hired to file the ex parte application, and he would try again on September 26, 2016 at 8:00 a.m. On September 26 at 11:36 a.m., Traylor sent an e-mail to the District's counsel saying his legal service was late to court and missed the deadline that day, so he rescheduled the ex parte application for September 28, 2016 at 8:00 a.m. According to the trial court, Traylor noticed and set three different ex parte hearings, and the District's counsel appeared at each one, but Traylor failed to appear each time.

On September 30, 2016, the District filed an ex parte application to dismiss the action for failure to file an amended complaint. (Cal. Rules of Court, rule 3.1320(h) [a

motion to dismiss and for entry of judgment after the expiration of time to amend following the sustaining of a demurrer may be made by ex parte application].) Traylor informed the District's counsel that he intended to send a contract attorney to the hearing to file an ex parte application on Epting's behalf seeking permission to file an amended complaint. But the contract attorney was not allowed to file an ex parte application because Epting's ex parte application had not been placed on the trial court's calendar. The contract attorney did not file written opposition to the District's application for dismissal. According to the District's appellate brief, no hearing was held on the dismissal application.

The trial court granted the District's application for dismissal pursuant to section 581, subdivision (f)(2), which provides that upon a request for dismissal, the trial court may dismiss the complaint after a demurrer to the complaint is sustained with leave to amend and the plaintiff fails to amend within the time allowed by the court. The District served Traylor with notice of entry of the dismissal order.

Twelve days after entry of the dismissal order, Epting filed an ex parte application to set aside the dismissal and for leave to file a first amended complaint. The appellate record does not contain a minute order relating to that application, but Epting indicates in her appellant's opening brief that the trial court denied her application without prejudice to filing a regularly-noticed motion. On November 3, 2016, Epting filed a motion to set aside "default," asking the trial court to vacate the dismissal and permit her to file a first amended complaint. The trial court entered a judgment of dismissal in favor of the District on November 4, 2016, and then denied Epting's motion to set aside default about two weeks later.

On November 29, 2016, Epting filed the motion that is the subject of this appeal. She filed a renewed motion to set aside the dismissal, vacate the judgment, and permit the filing of a first amended complaint. The motion was made pursuant to section 473. In a declaration in support of the motion, Traylor said he mistakenly assumed the procedure

for filing ex parte applications in Placer County was the same as in Los Angeles County, he made the mistake of not reserving a time for an ex parte hearing, and he misunderstood that he could file an ex parte application by messenger and submit on the papers. Although Traylor criticized the legal services company and the contract attorney, he admitted he should have appeared himself and should have used greater care. He acknowledged that the decisions he made were his fault.

The trial court issued a tentative ruling granting Epting relief under the mandatory portion of section 473, subdivision (b), but when nobody appeared on behalf of Epting at the hearing, the trial court declined to adopt the tentative ruling and instead denied Epting's motion for relief. The minute order constitutes the trial court's order and it does not state reasons for denying the November 29, 2016 motion. There is no reporter's transcript in the appellate record.

Because Epting's appellate briefs focus on the November 29, 2016 motion, we limit our review to the January 3, 2017 ruling on that motion.

DISCUSSION

Epting contends the trial court abused its discretion in denying her request for relief under section 473, subdivision (b).

Section 473, subdivision (b) provides for discretionary and mandatory relief. It begins by stating that the trial court "may" relieve a party from a judgment or dismissal taken pursuant to mistake, inadvertence, surprise, or excusable neglect. But the subdivision goes on to provide: "Notwithstanding any other requirements of this section, the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . dismissal entered against his or her client, unless the court finds that the . . . dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b), *italics added*.) A trial court does not have discretion to deny relief if the

requirements of the mandatory portion of the subdivision are established. (*Pagnini v. Union Bank, N.A.* (2018) 28 Cal.App.5th 298, 302-303; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1008.)

The mandatory portion of section 473 originally applied only to defaults, but the Legislature extended the provision to dismissals in 1992 so that plaintiffs whose cases are dismissed have relief comparable to defendants against whom default judgments are entered. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 617-618 (*Leader*).) Consistent with that purpose, courts have limited the application of the mandatory relief provision to dismissals which are the procedural equivalent of defaults, i.e., dismissals that occur because plaintiff's counsel failed to oppose a dismissal motion. (*Id.* at Pp. 618-620.)

The Court of Appeal in *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137 (*Younessi*) held that the mandatory provision of section 473 applied in a case where the plaintiffs did not oppose the defendant's ex parte application for dismissal and the trial court did not evaluate why the plaintiffs failed to timely file an amended complaint. (*Id.* at pp. 1148-1149.) The appellate court said those circumstances were the procedural equivalent of a default judgment. (*Ibid.*)

Here, dismissal was entered because Epting's counsel did not file a first amended complaint by the court-imposed deadline and did not file written opposition to the District's request for dismissal. According to the District, there was no hearing on the request for dismissal and thus no opportunity for oral argument by contract counsel. The trial court's January 3, 2017 order denied Epting's November 29, 2016 motion for relief without explaining why Traylor's declaration identifying his errors and omissions was insufficient. Although the District asserts the trial court considered Traylor's neglect when it granted the application for dismissal, the assertion is made without citation to the record. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239.) The trial court's ruling on the District's

ex parte application for dismissal does not discuss any such reasons. Under the circumstances, the mandatory portion of section 473 applies here. (*Younessi, supra*, 244 Cal.App.4th at pp. 1148-1149.)

The District characterizes Traylor's conduct as deliberate tactics and says the trial court had ample reason not to credit Traylor's explanations. But relief under the mandatory portion of section 473, subdivision (b) is available even for inexcusable neglect by an attorney. (*Leader, supra*, 89 Cal.App.4th at p. 616; *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487).)

We understand why the trial court may have lacked sympathy for Traylor's requests and why the District questions his credibility. We certainly do not condone Traylor's handling of this matter, which is why we will remand with directions that the trial court consider further orders under section 473, subdivision (c)(1). Nevertheless, based on the record before us, it appears that Epting should not be denied an opportunity to present an amended complaint simply because of her counsel's errors and omissions.

The District argues that lack of a viable proposed pleading is fatal to Epting's motion for relief. But none of the cases cited by the District stands for the proposition that a court may deny relief under the mandatory provision if the proposed pleading does not state a cause of action. *Lynch v. Spilman* (1967) 67 Cal.2d 251 addressed the discretionary, not mandatory, provision of section 473, subdivision (b) (*Lynch*, at p. 257), and the part of the *Lynch* test regarding the showing of a meritorious defense is no longer used. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 787-790.) The mandatory provision of section 473, subdivision (b) contains no such requirement.

The District also argues on appeal that Epting cannot succeed because her motion was really one for reconsideration and she did not show new or different facts or circumstances as required by section 1008. The argument is forfeited because the District did not raise it in the trial court. (*People v. Gerold* (2009) 174 Cal.App.4th 781, 786-787;

In re Michael R. (2006) 137 Cal.App.4th 126, 146; see also *Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1026; cf. *Andrus v. Estrada* (1995) 39 Cal.App.4th 1030, 1042.)

Because relief is mandatory under section 473, subdivision (b), we need not consider whether the trial court should also have granted relief under the discretionary portion of the statute.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to grant Epting relief under section 473, subdivision (b), and to consider whether to issue further orders pursuant to the relief and penalty provisions of section 473, subdivision (c)(1). Epting shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
RENNER, J.